

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 United States of America,

10  
11 Plaintiff,

12 v.

13 Ramon Ramos-Zepeda,

14 Defendant.  
15

No. CR-15-0976-TUC-CKJ (BGM)

**REPORT AND RECOMMENDATION**

16 Currently pending before the Court is Defendant Ramon Ramos-Zepeda's Motion  
17 to Suppress Statements (Doc. 37). The Government has filed its Response (Doc. 53).  
18 Govt.'s Response to Def.'s Mot. to Suppress Statements (Doc. 53). No reply has been  
19 filed. Also pending is Defendant's Amended Motion to Dismiss Indictment for Unlawful  
20 Exclusion Under Title 8 U.S.C. § 1326(d) (Doc. 29). The Government filed its Amended  
21 Response (Doc. 31) and Defendant replied (Doc. 33). Defendant is charged with one  
22 count of illegal re-entry after deportation in violation of Title 8, United States Code,  
23 Section 1326. Indictment (Doc. 6) at 1. Defendant Ramon Ramos-Zepeda seeks  
24  
25  
26  
27  
28

1 suppression of his statements allegedly obtained in violation of his *Miranda*<sup>1</sup> rights. *See*  
2 Def.'s Mot. to Suppress Statements (Doc. 37). Defendant additionally seeks dismissal of  
3 the Indictment because the previous order of removal against him was allegedly based on  
4 an unlawful exclusion. *See* Def.'s Amended Mot. to Dismiss Indictment for Unlawful  
5 Exclusion Under Title 8 U.S.C. §1326(d) (Doc. 29).  
6

7  
8 Pursuant to LRCrim. 5.1, this matter came before Magistrate Judge Macdonald for  
9 an evidentiary hearing and a report and recommendation. On February 19, 2016, an  
10 evidentiary hearing was held before Magistrate Judge Macdonald regarding the two  
11 motions. Minute Entry 2/19/2016 (Doc. 49). The hearing was continued on March 7,  
12 2016 and concluded on March 8, 2016. Minute Entry 3/7/2016 (Doc. 70); Minute Entry  
13 3/8/2016 (Doc. 74). The Magistrate Judge recommends that the District Court, after its  
14 independent review, deny Defendant's motions.  
15  
16  
17

## 18 **I. FACTUAL BACKGROUND**

### 19 ***A. The 2009 Encounter***

#### 20 **1. Initial Stop**

21  
22 On January 9, 2009 at approximately 8:00 a.m., Defendant Ramon Ramos-Zepeda  
23 entered the United States from Mexico near Naco, Arizona. Hr'g Tr. 2/19/2016 (Doc.  
24 79) 79:12–20; Hr'g Tr. 3/7/2016 (Doc. 77) 79:3–21. On January 12, 2009, United States  
25 Border Patrol ("USBP") Agent Jorge Borrego processed Defendant for expedited  
26  
27  
28

---

<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

1 removal. Hr'g Tr. 2/19/2016 (Doc. 79) 77:15–78:2, 79:21–23; *see also* Hr'g Tr. 3/7/2016  
2 (Doc. 77) 82:19–83:1. Although Defendant Ramos-Zepeda entered the United States on  
3 January 9, 2009, he was not apprehended until January 12, 2009. Hr'g Tr. 2/19/2016  
4 (Doc. 79) 79:24–80:17; Hr'g Tr. 3/7/2016 (Doc. 77) 79:3–25; *see also* Hr'g Tr. 3/8/2016  
5 (Doc. 78) 6:6–16. Agent Borrego has worked for the U.S. Border Patrol for just over  
6 eight (8) years. *Id.* at 64:4–7; Hr'g Tr. 3/7/2016 (Doc. 77) 4:9–11. Agent Borrego  
7 completed basic and field training, as well as post-academy training. Hr'g Tr. 2/19/2016  
8 (Doc. 79) 64:8–66:13; *see also* Hr'g Tr. 3/7/2016 (Doc. 77) 4:12–16. Additionally,  
9 Agent Borrego has spoken Spanish since childhood. Hr'g Tr. 2/19/2016 (Doc. 79)  
10 64:21–65:5. Agent Borrego has had specialty assignments including a detail in Tucson,  
11 Arizona as a processing agent, as well as a case agent. *Id.* at 66:14–67:1; *see also* Hr'g  
12 Tr. 3/7/2016 (Doc. 77) 5:11–20.

13  
14 Agent Borrego described his experience as a processing agent, explaining that  
15 when an individual is apprehended, they are then brought to a processing center. Hr'g Tr.  
16 2/19/2016 (Doc. 79) 67:2–19. Agent Borrego testified that agents in the field would  
17 collect biographical information from an individual and complete a field I-826 reflecting  
18 that information. *Id.* at 67:2–68:1. The field I-826 is then given to the processing agent.  
19 *Id.* 67:20–68:4, 69:12–15. At the station agents will run fingerprints and take a  
20 photograph of the individual. *Id.* at 67:14–68:18, 69:16–21, 70:14–24. Agent Borrego  
21 testified that agents consider an individual's criminal history, their immigration history,  
22 and whether they have a claim to being admissible to the United States. *Id.* at 68:11–  
23 69:11. The processing agent then inputs information regarding the individual into an E3.  
24  
25  
26  
27  
28

1 Hr'g Tr. 2/19/2016 (Doc. 79) 69:70:3; Hr'g Tr. 3/7/2016 (Doc. 77) 51:23–52:1. Agent  
2 Borrego further testified that when entering information into the E3 form, he does so with  
3 the individual standing in front him, going through each page of information with them.  
4  
5 Hr'g Tr. 2/19/2016 (Doc. 79) 70:4–10. As part of his processing, Agent Borrego verifies  
6 the name and date of birth of the individual, comparing the information with the field I-  
7 826. *Id.* at 70:25–71:9. Agent Borrego also confirms that the photograph represents the  
8 individual standing in front of him. *Id.* at 71:10–13, 75:14–18.  
9

10 Agent Borrego also testified that he inputs information obtained from the  
11 individual on an I-213 form. Hr'g Tr. 2/19/2016 (Doc. 79) 72:4–74:18; Hr'g Tr.  
12 3/7/2016 (Doc. 77) 18:10–11. Agent Borrego verifies the information received on the I-  
13 826 form, confirms that the individual has no credible fear, and confirms that they have a  
14 claim which may allow them to be in the United States.<sup>2</sup> Hr'g Tr. 2/19/2016 (Doc. 79)  
15 71:14–74:6. These variables, as well as criminal history and immigration history impact  
16 the way an individual will be processed. *Id.* If an individual refuses to answer a  
17 question, Agent Borrego will note that the individual “Failed to respond” or something  
18 similar on the form. *Id.* at 74:19–22. Other information obtained from the individual  
19 includes their height and weight, country of origin, how they entered the United States,  
20 and a United States address if they have one. *Id.* at 75:19–76:9.  
21  
22  
23  
24

25 Agent Borrego testified that he processed Defendant Ramos-Zepeda pursuant to  
26 this procedure on January 12, 2009. Hr'g Tr. 2/19/2016 (Doc. 79) 77:22–78:2; Hr'g Tr.

---

27 <sup>2</sup> Such claims may include, but are not limited to, derivative citizenship from the  
28 individual's parents or if they have children that are United States citizens. Hr'g Tr. 2/19/2016  
(Doc. 79) 71:14–75:13.

1 3/7/2016 (Doc. 77) 18:22–19:20, 57:4–16, 82:19–83:1. Defendant Ramos-Zepeda  
2 confirmed that Agent Borrego took his information and put it in the computer system.  
3  
4 Hr’g Tr. 3/8/2016 (Doc. 78) 9:22–10:14. Agent Borrego further testified that he matched  
5 the photo with the person being processed and asked Defendant Ramos-Zepeda  
6 biographical questions. Hr’g Tr. 2/19/2016 (Doc. 79) 78:14–25, 92:17–93:14. Defendant  
7 Ramos-Zepeda informed Agent Borrego that he was a Mexican national and entered the  
8 United States near Naco, Arizona on January 9, 2009 at approximately 8:00 a.m., and  
9 was apprehended on January 12, 2009. *Id.* at 79:3–80:3, 102:10–16; Hr’g Tr. 3/7/2016  
10 (Doc. 77) 20:12–21:24, 31:10–19, 79:3–25. Agent Borrego testified that the information  
11 provided by Defendant Ramos-Zepeda was consistent with the information provided on  
12 the field I-826 form. Hr’g Tr. 2/19/2016 (Doc. 79) 80:4–13, 85:16–86:13. Agent  
13 Borrego further testified that he received a criminal history regarding Defendant Ramos-  
14 Zepeda, including an outstanding warrant stemming from a May 23, 2006 conviction in  
15 Redwood City, California. *Id.* at 82:8–83:22; Hr’g Tr. 3/7/2016 (Doc. 77) 30:21–24,  
16 57:14–16. Agent Borrego also testified that this outstanding warrant would have made  
17 Defendant Ramos-Zepeda ineligible for a voluntary return. Hr’g Tr. 2/19/2016 (Doc. 79)  
18 83:19–22.

23 Agent Borrego testified that an individual is eligible for expedited removal, when  
24 he or she has entered the United States without going through a port of entry and is  
25 apprehended within fourteen (14) days of such entry and within one hundred (100) miles  
26 of the border. Hr’g Tr. 2/19/2016 (Doc. 79) 84:13–85:15; *see also* Hr’g Tr. 3/7/2016  
27 (Doc. 77) 58:22–25, 79:5–8. Agent Borrego further testified that the expedited removal  
28

1 process is an administrative proceeding, during which he obtains a sworn statement from  
2 the individual being processed. Hr'g Tr. 2/19/2016 (Doc. 79) 87:14–15; *see also* Hr'g Tr.  
3 3/7/2016 (Doc. 77) 6:11–7:9, 80:15–19. Prior to obtaining a statement, Agent Borrego  
4 testified that he informed Defendant Ramos-Zepeda regarding the expedited removal  
5 proceeding, including that Defendant Ramos-Zepeda did not appear to be admissible or  
6 have legal papers authorizing his admission into the United States and that as a result he  
7 may be denied admission and immediately returned to his home country without a  
8 hearing. Hr'g Tr. 2/19/2016 (Doc. 79) 98:5–99:4. Agent Borrego further testified that he  
9 informed Defendant Ramos-Zepeda that such removal may result in his being barred  
10 from reentry for a period of five (5) years or longer, and that Defendant Ramos-Zepeda  
11 appeared to understand this. *Id.* at 98:5–99:4, 103:11–19. Agent Borrego testified that he  
12 spoke with Defendant Ramos-Zepeda in Spanish while processing him for expedited  
13 removal. *Id.* at 88:16–90:18, 97:6–10; Hr'g Tr. 3/7/2016 (Doc. 77) 83:5–20. Defendant  
14 Ramos-Zepeda testified that he only speaks Spanish. Hr'g Tr. 3/8/2016 (Doc. 78) 14:20–  
15 15:1. Agent Borrego also testified that he confirmed with his supervisor that expedited  
16 removal was appropriate for Defendant Ramos-Zepeda. Hr'g Tr. 2/19/2016 (Doc. 79)  
17 81:21–82:3, 112:21–113:8. Defendant Ramos-Zepeda declined to speak with a consular  
18 representative during his immigration processing. *Id.* at 94:13–24. Agent Borrego  
19 testified that he informed Defendant Ramos-Zepeda that if he had fear or concern  
20 regarding removal from the United States, he would have an opportunity to speak with an  
21 officer for a determination regarding whether he should remain in the United States.  
22 Hr'g Tr. 2/19/2016 (Doc. 79) 100:9–101:14, 104:1–14. Defendant Ramos-Zepeda denies

1 that he was ever asked whether he had fear about returning to his country. Hr'g Tr.  
2 3/8/2016 (Doc. 78) 15:7–12. Agent Borrego also asked Defendant Ramos-Zepeda if  
3 there was anything that he would like to say or add. Hr'g Tr. 2/19/2016 (Doc. 79)  
4 103:20–25. Based upon the information obtained from Defendant Ramos-Zepeda, it was  
5 determined that he was inadmissible to the United States and ordered removed. Hr'g Tr.  
6 2/19/2016 (Doc. 79) 110:21–112:20; Hr'g Tr. 3/7/2016 (Doc. 77) 42:8–44:7, 77:9–78:12.  
7 Agent Borrego testified that he did not read Defendant Ramos-Zepeda his *Miranda* rights  
8 during processing, because USBP was not pursuing criminal prosecution. Hr'g Tr.  
9 3/7/2016 (Doc. 77) 24:24–25:4, 58:9–16, 82:9–12. The document finding Defendant  
10 Ramos-Zepeda was explained to and served upon him. Hr'g Tr. 2/19/2016 (Doc. 79)  
11 112:4–115:2; Hr'g Tr. 3/7/2016 (Doc. 77) 70:25–73:22, 84:9–85:20. Defendant Ramos-  
12 Zepeda testified that although he signed the forms, he did not read them because Agent  
13 Borrego told him that he was going to be extradited to California. Hr'g Tr. 3/8/2016  
14 (Doc. 78) 10:15–11:–16. Defendant Ramos-Zepeda further testified that Agent Borrego  
15 did not read anything to him because “he was angry at me because of the problem that I  
16 had in California.” *Id.* at 11:17–12:1.

17 Agent Borrego also testified that upon determining that Defendant Ramos-Zepeda  
18 had an outstanding warrant, Border Patrol contacted the agency with the outstanding  
19 warrant to see if they wanted to seek extradition. Hr'g Tr. 2/19/2016 (Doc. 79) 113:9–20.  
20 Agent Borrego further testified that Redwood City, California indicated that they did  
21 wish to seek extradition. *Id.* After Defendant Ramos-Zepeda was processed, Agent  
22 Borrego put the file together and waited for the agency seeking extradition to take

1 custody. *Id.* at 115:22–116:11. Agent Borrego testified that Santa Cruz County, Arizona  
2 took custody of Defendant Ramos-Zepeda for the extradition. *Id.* at 116:3–11.  
3 Defendant Ramos-Zepeda testified that he was in a cell for approximately four (4) hours,  
4 and then a policeman arrived and took him to Santa Cruz County. Hr’g Tr. 3/8/2016  
5 (Doc. 78) 14:9–19, 15:11–16:19. Once Defendant Ramos-Zepeda was transferred to state  
6 custody, Agent Borrego sent the file to the file control office. Hr’g Tr. 2/19/2016 (Doc.  
7 79) 12–14; Hr’g Tr. 3/7/2016 (Doc. 77) 62:2–15.

## 10 **2. January 14–15, 2009**

11 On January 14, 2009, Defendant Ramos-Zepeda was returned to USBP custody  
12 because San Mateo County, California denied extradition. Hr’g Tr. 3/7/2016 (Doc. 77)  
13 66:1–17; *see also* Hr’g Tr. 3/8/2016 (Doc. 78) 17:1–20. Defendant Ramos-Zepeda was  
14 sent to the Sonoita, Arizona station. Hr’g Tr. 3/7/2016 (Doc. 77) 60:13–20, 66:1–17;  
15 Hr’g Tr. 3/8/2016 (Doc. 78) 17:21–18:4. The agents on duty were unable to locate the  
16 original file. Hr’g Tr. 3/7/2016 (Doc. 77) 66:1–17. As such, on January 15, 2009 at 2:00  
17 a.m., the January 12, 2009 I-213, originally created by Agent Borrego was recreated by  
18 USBP Agent Anthony Rogers, who also signed on behalf of Agent Gerald Hoyt. *Id.* at  
19 64:21–65:17. Agent Rogers confirmed with the San Mateo County Sheriff’s Department  
20 that they were declining extradition. *Id.* at 66:1–17. Agent Rogers then contacted the  
21 Tucson sector prosecutions unit to determine whether Defendant Ramos-Zepeda could be  
22 prosecuted due to his prior convictions; however, the prosecutions unit confirmed that it  
23 was unable to prosecute Defendant Ramos-Zepeda because he was apprehended more  
24 than forty-eight (48) hours earlier. Hr’g Tr. 3/7/2016 (Doc. 77) 67:21–68:6. As a result,  
25  
26  
27  
28



1 Defendant Ramos-Zepeda was processed for expedited removal and a new I-860 issued  
2 and was signed by acting field operations supervisor David Barker. *Id.* Because agents  
3 considered prosecuting Defendant Ramos-Zepeda criminally, he was read his *Miranda*  
4 rights. *Id.* at 67:21–68:10.

6 Defendant Ramos-Zepeda testified that upon his return to the Sonoita station an  
7 individual took his information again. Hr’g Tr. 3/8/2016 (Doc. 78) 19:2–11. Defendant  
8 Ramos-Zepeda further testified that this included his name, but he did not recall being re-  
9 fingerprinted or asked whether he had a credible fear of returning to his country. *Id.* at  
10 19:8–20:5. Defendant Ramos-Zepeda also testified that no one reviewed the paperwork  
11 with him, and he only signed the forms because they were part of the processing. *Id.* at  
12 20:6–18. Defendant Ramos-Zepeda thought that he was being sent to Tucson to see an  
13 immigration judge, which did not occur. *Id.* at 20:19–23. Defendant Ramos-Zepeda was  
14 removed to Mexico on January 15, 2009. *Id.* at 21:5–22:13.

18 ***B. The Current Charged Offense***

19 **1. The 2015 Encounter**

20 At approximately midnight on May 1, 2015, United States Border Patrol  
21 (“USBP”) Agents Adam Letavay and Christopher Wagner were on duty near the  
22 Lukeville, Arizona port of entry. Hr’g Tr. 2/19/2016 (Doc. 79) 17:22–18:4, 47:14–25.  
23 Agent Letavay was assigned for a quick reactionary force at the port of entry, because  
24 there had been reports of violence further south on the Mexico side of the border, and a  
25 team of agents were assigned to be prepared if anything came north. *Id.* at 18:1–17.  
26 Agent Wagner indicated that he and the other agents were asked to stand by because the  
27  
28

1 Ajo station had no mobile agents at that time. *Id.* at 47:21–25. Agents Letavay, Wagner,  
2 and Swickheimer were in a parking lot just north of the port of entry. *Id.* at 18–18–19:13.

3  
4 Agent Letavay has been a USBP agent for approximately eight and one-half (8  
5 1/2) years. *Id.* at 13:10–11, 34:18–20. He is currently detailed at the San Diego sector  
6 mobile response team. *Id.* at 13:3–6. Agent Letavay completed basic and field training  
7 prior to becoming a USBP agent, as well as post academy training. Hr’g Tr. 2/19/2016  
8 (Doc. 79) 15:11–16:18, 34:1–17. Agent Letavay has also had specialty assignments as a  
9 border patrol agent, including the mobile response team. *Id.* at 16:19–17:10. His current  
10 unit specializes in arduous terrain and areas that are not readily accessible. *Id.* at 17:11–  
11 21.  
12

13  
14 Agent Wagner has also been a USBP agent for approximately eight and one-half  
15 (8 1/2) years. *Id.* at 45:3–5, 54:19–21. He is currently working out of the San Diego  
16 sector, with the air mobile unit or San Diego strike team. *Id.* at 44:23–45:1. Agent  
17 Wagner has been on the San Diego strike team for just under six (6) years. *Id.* at 45:6–8.  
18 Agent Wagner also received basic training and field training prior to becoming a USBP  
19 agent, as well as specialized training after graduating from the academy. Hr’g Tr.  
20 2/19/2016 (Doc. 79) 45:9–47:13.  
21

22  
23 Agent Letavay testified that early in the evening of May 1, 2015, he and Agents  
24 Wagner and Swickheimer heard what might have been shots southwest of the port of  
25 entry, but they were unconfirmed. *Id.* at 19:1–6. At approximately midnight, Agents  
26 Letavay, Wagner, and Swickheimer received a radio call from a mobile surveillance  
27 operator indicating that there were two vehicles at the border fence moving northbound  
28

1 across the border road. *Id.* at 19:14–22, 37:5–12, 48:1–15. Agents Letavay and Wagner  
2 testified that the three of them acknowledged the radio call and drove south to the border  
3 road and then eastbound along the border fence. Hr’g Tr. 2/19/2016 (Doc. 79) 19:23–  
4 20:12, 22:8–12, 36:25–37:12, 48:16–22. The mobile operator informed the agents as to  
5 where he had last seen the two individuals cross the border road and subsequently lost  
6 them in a small grove of trees. *Id.* at 20:13–18, 23:19–25, 37:25–38:22, 42:11–24.  
7  
8

9 Agent Letavay testified that it took approximately five (5) to ten (10) minutes for  
10 the agents to reach the two suspects. *Id.* at 21:7–14, 37:13–17. Agent Letavay further  
11 testified that while driving to the individuals’ last location, the agents maintained radio  
12 communication with the mobile operator, and stopped within approximately fifteen (15)  
13 meters of where the operator believed the individuals crossed the border road. *Id.* at  
14 22:13–25, 42:11–24. Agent Wagner confirmed Agent Letavay’s testimony. *Id.* at 48:16–  
15 22. Once at the location the mobile operator directed them to, the agents got out of the  
16 vehicle and used flashlights to look for foot signs from the border fence and along the  
17 border road. *Id.* at 23:1–12, 42:25–9, 48:23–49:7. Agent Letavay testified that he was  
18 able to find two (2) sets of prints running from the border fence, north-northeast across  
19 the road, into the grove of trees. Hr’g Tr. 2/19/2016 (Doc. 79) 23:13–18, 38:23–39:3.  
20 Agent Letavay further testified that the agents followed the foot signs across the road and  
21 into the trees, where the two subjects were concealed. *Id.* at 24:1–11, 39:1–6. Agents  
22 Letavay and Wagner testified that they were wearing rough duty uniforms, which  
23 includes green pants, green uniform shirt, name plate, badge, and Homeland Security and  
24 Border Patrol patches on each shoulder. *Id.* at 24:12–18, 49:20–50:3. Agent Letavay  
25  
26  
27  
28

1 also testified that as he approached the grove of trees he announced his presence as a  
2 USBP agent. *Id.* at 24:19–25:4. Agent Letavay further testified that upon entering the  
3 grove of trees, the agents discovered two (2) subjects, approximately five (5) feet apart,  
4 hiding in the lower brush. *Id.* at 25:5–9. Defendant Ramos-Zepeda confirmed that he  
5 was arrested on May 1, 2015 with one other person. Hr’g Tr. 3/8/2016 (Doc. 78) 22:19–  
6 23:2.  
7

8  
9 Agent Letavay approached one subject, while Eric Swickheimer approached the  
10 second subject. Hr’g Tr. 2/19/2016 (Doc. 79) 25:10–18, 49:8–19, 60:4–6. Agent  
11 Letavay testified that he patted down his subject, checking for weapons, and then placed  
12 him in handcuffs. *Id.* at 25:19–24. Meanwhile, Agent Wagner, who was standing  
13 between the two subjects, asked the 213 questions consisting of inquiring as to the  
14 subjects’ country of origin and whether they have any documentation to be in the United  
15 States. *Id.* at 25:19–26:12, 55:13–21, 60:4–6. Agent Wagner testified that the subjects  
16 were asked regarding their citizenship and paperwork in both English and Spanish. *Id.* at  
17 51:1–17. Agent Letavay testified that he heard the subject respond that he did not have  
18 immigration documents to remain in the United States and that he was from Michoacán, a  
19 state in Mexico. *Id.* at 26:7–12. Agent Wagner confirmed that the subjects stated that  
20 they were from Mexico. *Id.* at 49:8–19, 51:18–20. Agent Letavay further testified that  
21 he did not find any weapons on the person he made contact with. *Id.* at 26:13–16. Agent  
22 Letavay testified that he did not have his weapon drawn, and to his knowledge neither did  
23 the other agents. Hr’g Tr. 2/19/2016 (Doc. 79) 26:17–27:6. Agent Wagner also testified  
24 that he did not have his weapon drawn. *Id.* at 50:16–18. Defendant Ramos-Zepeda  
25  
26  
27  
28

1 testified that he was placed in a vehicle, driven for approximately 500 meters, got out,  
2 and then agents questioned him regarding where he was from. *Id.* at 23:12–24:7.

3  
4 Agent Letavay testified that once it was determined that the individuals were to be  
5 taken into custody, they were searched more thoroughly, placed in a marked vehicle with  
6 a cage, their belongings were searched, an apprehension sheet was completed by USBP  
7 agents, and the individuals were transported to the station for further processing. *Id.* at  
8 29:1–13, 39:21–40:4, 53:10–20. On this occasion, Agent Wagner transported the  
9 individuals, one of whom, Defendant Ramon Ramos-Zepeda, Agents Letavay and  
10 Wagner identified in court. *Id.* at 29:17–30:5, 51:21–52:16, 53:10–20.  
11  
12  
13

## 14 **II. ANALYSIS**

15 Defendant seeks suppression of his 2009 statement to federal officers, arguing that  
16 they were obtained in violation of *McNabb-Mallory*, as well as *Miranda*.<sup>3</sup> Def.’s Mot. to  
17 Suppress Statements (Doc. 37) at 4–9. Defendant also seeks suppression of his 2015  
18 statements made at the time of his initial encounter with border patrol, because they were  
19 allegedly obtained in violation of his *Miranda* rights. *Id.* at 9–10. Defendant also seeks  
20 dismissal of the indictment predicated on Defendant’s 2009 exclusion allegedly violating  
21 his due process rights. *See* Def.’s Mot. to Dismiss (Doc. 29).  
22  
23  
24

### 25 **A. *McNabb-Mallory***

26 Rule 5(a), Federal Rules of Criminal Procedure provides that “[a] person  
27

---

28 <sup>3</sup> The Government averred at oral argument that it does not intend to use Defendant’s  
January 15, 2009 statement at trial. Hr’g Tr. 2/19/2016 (Doc. 79) 10:10–12:3. As such, the only  
statement from 2009 currently at issue is that made on January 12, 2009.

1 making an arrest within the United States must take the defendant without unnecessary  
2 delay before a magistrate judge, or before a state or local judicial officer as 5(c) provides,  
3 unless a statute provides otherwise.” Fed. R. Crim. P. 5(a)(1)(A). In *McNabb v. United*  
4 *States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States*,  
5 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), the Supreme Court of the United  
6 States established “the rule known simply as *McNabb-Mallory* [which] ‘generally  
7 render[s] inadmissible confessions made during periods of detention that violat[e] the  
8 prompt presentment requirement of Rule 5(a).’” *Corley v. United States*, 556 U.S. 303,  
9 309, 129 S.Ct. 1558, 1563, 173 L.Ed.2d 443 (2009) (2d and 3d alteration in original)  
10 (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 354, 114 S.Ct. 1599, 128  
11 L.Ed.2d 319 (1994)).

12  
13 In 1968, Congress “enacted 18 U.S.C. § 3501 in response to *Miranda v.*  
14 *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and to the application of  
15 *McNabb-Mallory* in some federal courts.” *Corley*, 556 U.S. at 309, 129 S.Ct. at 1563.  
16  
17 Section 3501(c), 18. U.S.C. provides:

18  
19 In any criminal prosecution by the United States or by the District of  
20 Columbia, a confession made or given by a person who is a defendant  
21 therein, while such person was under arrest or other detention in the  
22 custody of any law-enforcement officer or law-enforcement agency, shall  
23 not be inadmissible solely because of delay in bringing such person before  
24 a magistrate judge or other officer empowered to commit persons charged  
25 with offenses against the laws of the United States or of the District of  
26 Columbia if such confession is found by the trial judge to have been made  
27 voluntarily and if the weight to be given the confession is left to the jury  
28 and if such confession was made or given by such person within six hours  
immediately following his arrest or other detention: *Provided*, That the  
time limitation contained in this subsection shall not apply in any case in  
which the delay in bringing such person before such magistrate judge or

1 other officer beyond such six-hour period is found by the trial judge to be  
2 reasonable considering the means of transportation and the distance to be  
3 traveled to the nearest available such magistrate judge or other officer.

4 18 U.S.C. § 3501(c). In *Corley*, the Court considered the impact of § 3501(c) on the  
5 *McNabb-Mallory* rule, holding that:

6 [Section] 3501[, 18 U.S.C.,] modified *McNabb-Mallory* without  
7 supplanting it. Under the rule as revised by § 3501(c), a district court with  
8 a suppression claim must find whether the defendant confessed within six  
9 hours of arrest (unless a longer delay was “reasonable considering the  
10 means of transportation and the distance to be traveled to the nearest  
11 available [magistrate judge]”). If the confession came within that period, it  
12 is admissible, subject to the other Rules of Evidence, so long as it was  
13 ‘made voluntarily and . . . the weight to be given [it] is left to the jury.’  
14 *Ibid.* If the confession occurred before presentment and beyond six hours,  
15 however, the court must decide whether delaying that long was  
16 unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it  
17 was, the confession is to be suppressed.

18 *Corley*, 556 U.S. at 322, 129 S.Ct. at 1571 (alterations 3–5 in original).

19 Here, Defendant Ramos-Zepeda entered the United States from Mexico on  
20 January 9, 2009 near Naco, Arizona. Hr’g Tr. 2/19/2016 (Doc. 79) 79:3–80:3, 102:10–  
21 16; Hr’g Tr. 3/7/2016 (Doc. 77) 20:12–21:24, 31:10–19, 79:3–21. He was apprehended  
22 by United States Border Patrol agents at approximately 1:30 a.m. on January 12, 2009  
23 and processed by USBP Agent Borrego. Hr’g Tr. 2/19/2016 (Doc. 79) 77:15–78:2, 79:3–  
24 80:17; Hr’g Tr. 3/7/2016 (Doc. 77) 20:12–21:24, 31:10–19, 79:3–25, 82:19–83:1; Hr’g  
25 Tr. 3/8/2016 (Doc. 78) 6:6–16. As part of processing, Defendant Ramos-Zepeda was  
26 fingerprinted and photographed. Hr’g Tr. 2/19/2016 (Doc. 79) 77:22–78:25, 92:17–  
27 93:14; Hr’g Tr. 3/7/2016 (Doc. 77) 18:22–19:20, 57:4–16, 82:19–83:1. Defendant  
28 Ramos-Zepeda informed Agent Borrego that he was a Mexican national and entered the

1 United States near Naco, Arizona. Hr’g Tr. 2/19/2016 (Doc. 79) 79:3–80:3, 102:10–16;  
2 Hr’g Tr. 3/7/2016 (Doc. 77) 20:12–21:24, 31:10–19, 79:3–25. During processing, Agent  
3 Borrego discovered that Defendant had an outstanding warrant stemming from a May 23,  
4 2006 conviction in Redwood City, California. Hr’g Tr. 2/19/2016 (Doc. 79) 82:8–83:22;  
5 Hr’g Tr. 3/7/2016 (Doc. 77) 30:21–24, 57:14–16. Agent Borrego testified that he spoke  
6 Spanish to Defendant Ramos-Zepeda and that he explained the expedited removal  
7 process to him. Hr’g Tr. 2/19/2016 (Doc. 79) 88:16–90:18, 97:6–10, 98:5–99:4; Hr’g Tr.  
8 3/7/2016 (Doc. 77) 83:5–20. Defendant Ramos-Zepeda declined to speak with a consular  
9 representative and did not indicate any fear about returning to his country. Hr’g Tr.  
10 2/19/2016 (Doc. 79) 94:13–24, 100:9–101:14, 104:1–14. Despite Defendant’s testimony  
11 to the contrary, the Court finds Agent Borrego credible. After processing, Santa Cruz  
12 County, Arizona took custody of Defendant Ramos-Zepeda for extradition to California.  
13 Hr’g Tr. 2/19/2016 (Doc. 79) 116:3–11.

14 Defendant was never charged with a criminal violation. As such, *McNabb-*  
15 *Mallory* does not apply. Even if the Court were to accept that it is applicable, Defendant  
16 Ramos-Zepeda’s statement was given within the first six (6) hours after his arrest and  
17 was voluntarily made. As such, there can be no *McNabb-Mallory* violation.

## 23 ***B. Miranda***

### 24 **1. In General**

25 The Fifth Amendment to the United States Constitution provides that “[n]o person  
26 . . . shall be compelled in any criminal case to be a witness against himself[.]” U.S.  
27 Const. amend. V. The Supreme Court of the United States has “recognized that custodial  
28



1 interrogations, by their very nature, generate ‘compelling pressures which work to  
2 undermine the individual’s will to resist and to compel him to speak where he would not  
3 otherwise do so freely.’” *Moran v. Burbine*, 475 U.S. 412, 420, 96 S.Ct. 1135, 1140, 89  
4 L.Ed.2d 410 (1986) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602,  
5 1624, 16 L.Ed.2d 694 (1966)). “To combat this inherent compulsion, and thereby protect  
6 the Fifth Amendment privilege against self-incrimination, *Miranda* imposed on the police  
7 an obligation to follow certain procedures in their dealings with the accused.” *Moran*,  
8 475 U.S. at 420, 96 S.Ct. at 1140. Specifically, the Court has found the Constitution  
9 requires “that a person questioned by law enforcement officers after being ‘taken into  
10 custody or otherwise deprived of his freedom of action in any significant way’ must first  
11 ‘be warned that he has a right to remain silent, that any statement he does make may be  
12 used as evidence against him, and that he has a right to the presence of an attorney, either  
13 retained or appointed.’” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting  
14 *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). “An officer’s obligation to administer  
15 *Miranda* warnings attaches . . . ‘only where there has been such a restriction on a  
16 person’s freedom as to render him “in custody.”’” *Stansbury*, 511 U.S. at 322 (quoting  
17 *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

## 23 **2. In Custody**

24 “Custodial” means taken into custody or otherwise deprived of freedom of action  
25 in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“By custodial  
26 interrogation, we mean questioning initiated by law enforcement officers after a person  
27 has been taken into custody or deprived of his freedom of action in any significant  
28

1 way.”). “Two discrete inquiries are essential to the [“in custody”] determination: first,  
2 what were the circumstances surrounding the interrogation; and second, given those  
3 circumstances, would a reasonable person have felt he or she was not at liberty to  
4 terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112, 116  
5 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995). The Ninth Circuit Court of Appeals has further  
6 delineated that “[t]o determine whether an individual was in custody, a court must, after  
7 examining all of the circumstances surrounding the interrogation, decide ‘whether there  
8 [was] a formal arrest or restraint on freedom of movement of the degree associated with a  
9 formal arrest.’” *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (quoting  
10 *Stansbury v. California*, 511 U.S. 318, 322, 144 S.Ct. 1526, 128 L.Ed.2d 293 (1994)).

### 14 **3. Interrogation**

15 “Not every question asked in a custodial setting constitutes ‘interrogation.’”  
16 *United States v. Mata-Abundiz*, 717 F.2d 1277, 1278 (9th Cir. 1983) (citing *United States*  
17 *v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981)). “The test is whether ‘under all of the  
18 circumstances involved in a given case, the questions are ‘reasonably likely to elicit an  
19 incriminating response from the suspect.’” *Mata-Abundiz*, 717 F.2d at 1278–79 (quoting  
20 *Booth*, 669 F.2d at 1237; *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689,  
21 64 L.Ed.2d 297 (1980)).

24 “[I]nterrogation’ under *Miranda* refers not only to express questioning, but also to  
25 any words or actions on the part of the police (other than those normally attendant to  
26 arrest and custody) that the police should know are reasonably likely to elicit an  
27 incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100  
28

1 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). As such, “[i]nterrogation,’ as conceptualized  
2 in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that  
3 inherent in custody itself.” *Id.* at 300, 100 S.Ct. at 1689.  
4

5 “Ordinarily, the routine gathering of background biographical data will not  
6 constitute interrogation.” *Booth*, 669 F.2d at 1238 (citations omitted). “If, however, the  
7 questions are reasonably likely to elicit an incriminating response in a particular situation,  
8 the exception does not apply.” *Mata-Abundiz*, 717 F.2d at 1280 (citing *Booth*, 669 F.2d  
9 at 1238). As such, the Ninth Circuit Court of Appeals has held “that in-custody  
10 questioning by INS investigators must be preceded by *Miranda* warnings, if the  
11 questioning is reasonably likely to elicit an incriminating response.” *Id.* Subsequently,  
12 the Ninth Circuit Court of Appeals recognized that where “an INS agent’s purely  
13 administrative interview of the defendant was . . . for the ‘sole purpose’ of determining  
14 whether the defendant was subject to an administrative action for deportation[,]” *Miranda*  
15 warnings were not required. *United States v. Chen*, 439 F.3d 1037 (9th Cir. 2006) (citing  
16 *United States v. Salgado*, 292 F.3d 1169 (9th Cir. 2002)). The *Salgado* court recognized  
17 that there was no evidence that the interviewing agent “could (or did) reasonably believe  
18 that [the defendant] could be incriminating himself on account of the likelihood that he  
19 would reenter illegally and commit more crimes a year later.” *Salgado*, 292 F.3d at 1173.  
20  
21  
22  
23  
24

25 Here, Agent Borrego processed Defendant Ramos-Zepeda for possible extradition  
26 to California and an expedited removal from the United States because he had entered the  
27 United States without going through a port of entry and was apprehended within fourteen  
28 (14) days of such entry and within one hundred (100) miles of the border. Hr’g Tr.

1 2/19/2016 (Doc. 79) 84:13–85:15, 113:9–20; *see also* Hr’g Tr. 3/7/2016 (Doc. 77) 58:22–  
2 25, 79:5–8. Agent Borrego could not predict that Defendant would violate the law six (6)  
3 years later. As such, the Court finds this case is more similar to *Salgado* than *Mata-*  
4 *Abundiz*. Agent Borrego processed Defendant Ramos-Zepeda administratively, and no  
5 criminal charges were brought based on Defendant’s 2009 entry. *See* Hr’g Tr. 3/7/2016  
6 (Doc. 77) 24:24–25:4, 58:9–16, 67:21–68:6, 82:9–12. Accordingly, Agent Borrego’s  
7 interview was not an interrogation, and there was no *Miranda* violation. *Salgado*, 292  
8 F.3d at 1174.

### 11 **C. Terry Stop**

12 “The Fourth Amendment prohibits ‘unreasonable searches and seizures’ by the  
13 Government, and its protections extend to brief investigatory stops of persons or vehicles  
14 that fall short of traditional arrest.” *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct.  
15 744, 750, 151 L.Ed.2d 740 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20  
16 L.Ed.2d 889 (1968); *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66  
17 L.Ed.2d 621 (1981)). For the police to conduct a valid stop, they must “have a  
18 reasonable suspicion supported by articulable facts that criminal activity may be afoot.”  
19 *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989)  
20 (internal quotes and citation omitted). “[T]he level of suspicion required for a *Terry*  
21 stop[, however,] is obviously less demanding than that for probable cause.” *Id.* at 8, 109  
22 S.Ct. at 1585 (internal citations omitted). “Officers on roving border patrols . . . may  
23 conduct ‘brief investigatory stops’ without violating the Fourth Amendment ‘if the  
24 officer’s action is supported by reasonable suspicion to believe that criminal activity may  
25  
26  
27  
28

1 be afoot.’” *United States v. Valdes-Vega*, 738 F.3d 1074, 1078 (9th Cir. 2013) (en banc)  
2 (citations omitted).

3  
4 “Reasonable suspicion is defined as ‘a particularized and objective basis for  
5 suspecting the particular person stopped of criminal activity.’” *Id.* (quoting *United States*  
6 *v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (en banc)). “The reasonable-suspicion  
7 standard is not a particularly high threshold to reach.” *Valdes-Vega*, 738 F.3d at 1078.  
8 Furthermore, although “a mere hunch is insufficient to justify a stop, the likelihood of  
9 criminal activity need not rise to the level required for probable cause, and it falls  
10 considerably short of satisfying a preponderance of the evidence standard.” *Id.* (quoting  
11 *Arvizu*, 534 U.S. at 274, 122 S.Ct. 744) (citations and internal quotation marks omitted).

14 When making a reasonable-suspicion determination, the reviewing court “must  
15 look at the ‘totality of the circumstances’ of each case to see whether the detaining officer  
16 has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” *United*  
17 *States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002)  
18 (citations omitted); *see also United States v. Alvarez*, 899 F.2d 833, 836 (9th Cir. 1990).  
19 In so doing, officers are allowed “to draw on their own experience and specialized  
20 training to make inferences from and deductions about the cumulative information  
21 available to them that ‘might well elude an untrained person.’” *Id.* at 273, 122 S.Ct. at  
22 750-51. (citations omitted); *see also Valdes-Vega*, 738 F.3d at 1078. Moreover, what  
23 may seem to be innocuous conduct when viewed in isolation may be appropriately  
24 considered when considering the totality of the circumstances; thus, it is inappropriate to  
25 view factors in isolation and to give no weight to factors which may have an innocent  
26  
27  
28

1 explanation. *Arvizu*, 534 U.S. at 273-75, 122 S.Ct. at 750-51; *see also Cotterman*, 709  
2 F.3d at 970 (“It is not our province to nitpick the factors in isolation but instead to view  
3 them in the totality of the circumstances.”). Furthermore, “A determination that  
4 reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.”  
5 *Valdes-Vega*, 738 F.3d at 1078-79 (citing *Arvizu*, 534 at 277, 122 S.Ct. 744) (alterations  
6 in original).  
7  
8

9 “In the context of border patrol stops, the totality of the circumstances may include  
10 characteristics of the area, proximity to the border, usual patterns of traffic and time of  
11 day, previous alien or drug smuggling in the area, behavior of the driver, appearance or  
12 behavior of passengers, and the model and appearance of the vehicle.” *Valdes-Vega*, 738  
13 F.3d at 1079 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85, 95 S.Ct.  
14 2574, 45 L.Ed.2d 607 (1975)). “Not all of these factors must be present or highly  
15 probative in every case to justify reasonable suspicion[,] . . . [a]nd the facts must be  
16 filtered through the lens of the agents’ training and experience.” *Valdes-Vega*, 738 F.3d  
17 at 1079 (citations omitted).  
18  
19

20 Furthermore, in executing a *Terry* stop, an officer may ask questions “reasonably  
21 related in scope to the justification for their initiation.” *Terry*, 392 U.S. at 29, 88 S.Ct.  
22 1868. “An ‘officer may question [individuals reasonably detained near the border] about  
23 their citizenship and immigration status, and he may ask them to explain suspicious  
24 circumstances, but any further detention or search must be based on consent or probable  
25 cause.’” *United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005)  
26 (alterations in original) (quoting *Brignoni-Ponce*, 422 U.S. at 881–82, 95 S.Ct. 2574),  
27  
28

1 overruled in part on other grounds by *Melendez-Diaz v. Massachusetts*, 557 U.S. 305,  
2 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)).

3  
4 Here, USBP agents discovered Defendant Ramos-Zepeda hiding in a grove of  
5 trees with another individual. Hr’g Tr. 2/19/2016 (Doc. 79) 25:5–9. Agents tracked  
6 Defendant to that location based on the information obtained from a mobile operator who  
7 had seen the two individuals cross the border road. *Id.* at 20:13–18, 23:13–24:11, 37:25–  
8 39:6, 42:11–24. Agents Letavay, Wagner, and Swickheimer had reasonable suspicion  
9 that criminal activity was afoot and were justified in their questioning of Defendant  
10 Ramos-Zepeda and the individual hiding with him. *Sokolow*, 490 U.S. at 7, 109 S.Ct. at  
11 1585. The Court finds the agents’ testimony that they questioned Defendant Ramos-  
12 Zepeda immediately upon encountering him credible. The Court does not credit  
13 Defendant’s testimony that they drove 500 meters, got out of the vehicle, and then  
14 questioned him. The Court finds that the brief questioning that occurred regarding  
15 Defendant Ramos-Zepeda’s citizenship and immigration status upon agents’ discovery of  
16 him hiding in the bushes is not custodial interrogation and does not violate of *Miranda*.  
17 *See Cervantes-Flores*, 421 F.3d at 829–30. As such, Defendant’s 2015 statements should  
18 not be suppressed.

19  
20  
21  
22  
23 ***D. Due Process in Prior Removal***

24 “To convict an alien criminal defendant of illegal reentry under 8 U.S.C. § 1326,  
25 the government must prove that the alien left the United States under order of exclusion,  
26 deportation, or removal, and then illegally reentered.” *United States v. Barajas-*  
27 *Alvarado*, 655 F.3d 1077, 1079 (9th Cir. 2011). A defendant charged under Section 1326  
28

1 “may not challenge the validity of the deportation order . . . unless the alien demonstrates  
2 that – (1) the alien exhausted any administrative remedies that may have been available to  
3 seek relief against the order; (2) the deportation proceedings at which the order was  
4 issued improperly deprived the alien of the opportunity for judicial review; and (3) the  
5 entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d). “To satisfy the third  
6 prong—that the order was fundamentally unfair—the defendant bears the burden of  
7 establishing both that the ‘deportation proceedings violate[d] [his] due process rights’ and  
8 that the violation caused prejudice. *United States v. Raya-Vaca*, 771 F.3d 1195, 1201–02  
9 (9th Cir. 2014) (citations omitted) (alterations in original).  
10  
11  
12

13 “The regulations governing expedited removal proceedings codify, in mandatory  
14 terms, the immigration officer’s duty to inform the alien of the charge against him and to  
15 allow the alien to review the sworn statement prepared in his name.” *Id.* at 1204 (citing 8  
16 C.F.R. §235.3(b)(2)(i). Section 235.3(b)(2)(i), Code of Federal Regulations, provides in  
17 relevant part:  
18

19 In every case in which the expedited removal provisions will be applied and  
20 before removing an alien from the United States pursuant to his section, the  
21 examining immigration officer shall create a record of the facts of the case  
22 and statements made by the alien. This shall be accomplished by means of  
23 a sworn statement using Form I-867AB, Record of Sworn Statement in  
24 Proceedings under Section 235(b)(1) of the Act. The examining  
25 immigration officer shall read (or have read) to the alien all information  
26 contained on Form I-867A. Following questioning and recording of the  
27 alien’s statement regarding identity, alienage, and inadmissibility, the  
28 examining immigration officer shall record the alien’s response to the  
questions contained on Form I-867B, and have the alien read (or have read  
to him or her) the statement, and the alien shall sign and initial each page of  
the statement and each correction. The examining immigration officer shall  
advise the alien of the charges against him or her on Form I-860, Notice  
and Order of Expedited Removal, and the alien shall be given an



1 opportunity to respond to those charges in the sworn statement. After  
2 obtaining supervisory concurrence in accordance with paragraph (b)(7) of  
3 this section, the examining immigration official shall serve the alien with  
4 Form I-860 and the alien shall sign the reverse of the form acknowledging  
5 receipt. Interpretative assistance shall be used if necessary to communicate  
6 with the alien.

7 8 C.F.R. § 235.3(b)(2)(i).

8 As an initial matter, the Court finds Agent Borrego's testimony credible. Agent  
9 Borrego testified that he processed Defendant Ramos-Zepeda pursuant to the standard  
10 procedure for processing on January 12, 2009. Hr'g Tr. 2/19/2016 (Doc. 79) 77:22–78:2;  
11 Hr'g Tr. 3/7/2016 (Doc. 77) 18:22–19:20, 57:4–16, 82:19–83:1. Agent Borrego further  
12 testified that he matched the photo with the person being processed and asked Defendant  
13 Ramos-Zepeda biographical questions. Hr'g Tr. 2/19/2016 (Doc. 79) 78:14–25, 92:17–  
14 93:14. Defendant Ramos-Zepeda informed Agent Borrego that he was a Mexican  
15 national and entered the United States near Naco, Arizona on January 9, 2009 at  
16 approximately 8:00 a.m., and was apprehended on January 12, 2009. *Id.* at 79:3–80:3,  
17 102:10–16; Hr'g Tr. 3/7/2016 (Doc. 77) 20:12–21:24, 31:10–19, 79:3–25. Agent  
18 Borrego testified that the information provided by Defendant Ramos-Zepeda was  
19 consistent with the information provided on the field I-826 form. Hr'g Tr. 2/19/2016  
20 (Doc. 79) 80:4–13, 85:16–86:13. Agent Borrego further testified that he received a  
21 criminal history regarding Defendant Ramos-Zepeda, including an outstanding warrant  
22 stemming from a May 23, 2006 conviction in Redwood City, California. *Id.* at 82:8–  
23 83:22; Hr'g Tr. 3/7/2016 (Doc. 77) 30:21–24, 57:14–16. Agent Borrego also testified  
24 that this outstanding warrant would have made Defendant Ramos-Zepeda ineligible for a  
25  
26  
27  
28

1 voluntary return. Hr'g Tr. 2/19/2016 (Doc. 79) 83:19–22.

2 Agent Borrego testified that the expedited removal process is an administrative  
3 proceeding, during which he obtains a sworn statement from the individual being  
4 processed. Hr'g Tr. 2/19/2016 (Doc. 79) 87:14–15; *see also* Hr'g Tr. 3/7/2016 (Doc. 77)  
5 6:11–7:9, 80:15–19. Prior to obtaining a statement, Agent Borrego testified that he  
6 informed Defendant Ramos-Zepeda regarding the expedited removal proceeding,  
7 including that Defendant Ramos-Zepeda did not appear to be admissible or have legal  
8 papers authorizing his admission into the United States and that as a result he may be  
9 denied admission and immediately returned to his home country without a hearing. Hr'g  
10 Tr. 2/19/2016 (Doc. 79) 98:5–99:4. Agent Borrego further testified that he informed  
11 Defendant Ramos-Zepeda that such removal may result in his being barred from reentry  
12 for a period of five (5) years or longer, and that Defendant Ramos-Zepeda appeared to  
13 understand this. *Id.* at 98:5–99:4, 103:11–19. Agent Borrego testified that he spoke with  
14 Defendant Ramos-Zepeda in Spanish while processing him for expedited removal. *Id.* at  
15 88:16–90:18, 97:6–10; Hr'g Tr. 3/7/2016 (Doc. 77) 83:5–20. Agent Borrego also  
16 testified that he confirmed with his supervisor that expedited removal was appropriate for  
17 Defendant Ramos-Zepeda. Hr'g Tr. 2/19/2016 (Doc. 79) 81:21–82:3, 112:21–113:8.  
18 Defendant Ramos-Zepeda declined to speak with a consular representative during his  
19 immigration processing. *Id.* at 94:13–24. Agent Borrego testified that he informed  
20 Defendant Ramos-Zepeda that if he had fear or concern regarding removal from the  
21 United States, he would have an opportunity to speak with an officer for a determination  
22 regarding whether he should remain in the United States. Hr'g Tr. 2/19/2016 (Doc. 79)

1 100:9–101:14, 104:1–14. Agent Borrego also asked Defendant Ramos-Zepeda if there  
2 was anything that he would like to say or add. Hr’g Tr. 2/19/2016 (Doc. 79) 103:20–25.  
3  
4 Based upon the information obtained from Defendant Ramos-Zepeda, it was determined  
5 that he was inadmissible to the United States and ordered removed. Hr’g Tr. 2/19/2016  
6 (Doc. 79) 110:21–112:20; Hr’g Tr. 3/7/2016 (Doc. 77) 42:8–44:7, 77:9–78:12. The  
7 document finding Defendant Ramos-Zepeda was explained to and served upon him.  
8  
9 Hr’g Tr. 2/19/2016 (Doc. 79) 112:4–115:2; Hr’g Tr. 3/7/2016 (Doc. 77) 70:25–73:22,  
10 84:9–85:20. Defendant Ramos-Zepeda did not, however, sign the back of the form  
11 acknowledging receipt. As such, there was a technical violation of 8 C.F.R. §  
12 235.3(b)(2).  
13

14 “To succeed in demonstrating that the [2009] expedited removal order was  
15 fundamentally unfair, [Defendant Ramos-Zepeda] must also establish that he suffered  
16 prejudice as a result of the entry of the order . . . [by] show[ing] that he had ‘plausible  
17 grounds for relief’ from the removal order.” *Raya-Vaca*, 771 F.3d at 1206. Defendant  
18 Ramos-Zepeda has not met his burden. At the time of his 2009 removal, Defendant  
19 Ramos-Zepeda did not have any legal status in the United States, he was not eligible for  
20 cancellation of removal, he did not have any family here, he was not eligible for  
21 temporary protected status due to his prior felony conviction, and he did not indicate any  
22 fear of returning to Mexico. Moreover, withdrawal of an application for admission is at  
23 the discretion of the Attorney General. 8 U.S.C. § 1225(a)(4). Accordingly, Defendant  
24 has failed to show prejudice as a result of his 2009 removal order.  
25  
26  
27  
28

